

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

IN RE: PUBLIC WORKS CASE NO. 99-037

ALAMEDA CORRIDOR PROJECT¹

A&A READY MIX CONCRETE AND ROBERTSON'S READY MIX CONCRETE

I. Introduction and Procedural History

On August 27, 1999, the Director of the Department of Industrial Relations ("Director") issued a public works coverage determination finding that drivers delivering ready-mix concrete to the Alameda Corridor Project ("Project") are entitled to the payment of prevailing wages pursuant to Labor Code section 1772 and the California Appellate Court decision in O.G. Sansone v. California Department of Transportation (1976) 55 Cal.App.3d 434, 127 Cal.Rptr. 799. On September 24, 1999, A&A Ready Mix Concrete ("A&A") and Robertson's Ready Mix Concrete ("Robertson's") (collectively, "A&A/Robertson's") filed appeals of the Director's determination. The Teamsters Rock Products and Ready Mixed Concrete Industries Training and Upgrading Fund and Teamsters Local Union No. 420 (hereinafter "Teamsters") responded to the appeals on October 12, 1999, and October 14, 1999, respectively. Additional responses were filed by the Southern California Rock Products

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¹ The initial determination was entitled the "Orange County Alameda Corridor Project" in error. The Project takes place in Los Angeles County.

1 Association/Southern California Ready Mixed Concrete Association
2 and the Tutor-Saliba Corporation on October 1st and October 14th,
3 respectively. On October 18, 1999, the Alameda Corridor
4 Transportation Authority ("ACTA") received permission to file a
5 response to the appeals by November 19, 1999, but to date no
6 response has been filed. On March 14, 2000, a telephonic
7 conference was convened by the Department of Industrial Relations
8 among Teamsters, Tutor-Saliba, A&A and Robertson's and their
9 counsel to clarify certain material points not fully addressed in
10 the written submissions. All parties were given until the close of
11 business on March 17, 2000 to respond in writing to the questions
12 asked during the telephonic conference. Teamsters, Tutor-Saliba,
13 A&A, and Robertson's submitted written responses.

15 II. Issues and Conclusions on Appeal

16 A&A/Robertson's contend that they are not required to pay
17 prevailing wages to their drivers delivering ready-mix concrete to
18 the Project because A&A/Robertson's are commercial material
19 suppliers² engaged only in the delivery of goods, and not
20 contractors or subcontractors to the Project. They further assert
21 that the 1999 failure in the California Legislature of a provision
22 in Assembly Bill 302 that rendered on-hauling of concrete mix a
23 public works reflects a legislative intent that such on-hauling is
24 not a public work. A&A/Robertson's also argue that their
25 procedural due process rights were denied when they were not
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28 ² The case law uses the term "materialmen." In this decision, the term
"material supplier" will be used to achieve gender neutrality.

1 notified of the public works coverage request before the August
2 27, 1999, determination issued and were not served with the
3 determination by the time of their appeals.

4 Teamsters argue that the special design of the ready-mix
5 concrete, the sophistication of the work of the delivery drivers,
6 and the integral relationship of their duties to the work of the
7 Project require that the drivers be paid prevailing wages.
8 Teamsters also assert that A&A/Robertson's due process objections
9 are moot.

10 For the reasons discussed below, I find that:

11 (1) A&A/Robertson's are material suppliers and not
12 subcontractors. There is, therefore, no requirement to pay
13 prevailing wages to A&A/Robertson's drivers delivering ready-mix
14 concrete to the Project.
15

16 (2) The failure in the California Legislature of a portion
17 of AB 302 concerning on-hauling of concrete materials to public
18 works sites does not evidence a legislative intent that commercial
19 batch plant delivery of ready-mix is not a public work.

20 (3) A&A/Robertson's procedural due process objections are
21 moot.

22 III. Relevant Facts

23 1. The Alameda Corridor Project

24 The Project involves the construction of a 20-mile railroad
25 express line to connect the ports of Los Angeles and Long Beach to
26 the transcontinental rail network east of downtown Los Angeles.
27 Its goal is to consolidate several rail lines to create a faster
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1 and more efficient way to distribute cargo from Southern
2 California throughout the United States. The Project will result
3 in the elimination of more than 200 street-level railroad
4 crossings. It will include the construction of five railroad
5 bridges and four bridges for automotive traffic over Compton Creek
6 and the Dominguez Channel.

7 In addition, the Project will include the construction of a
8 10-mile long trench, or corridor, 33 feet deep and 50 feet wide,
9 which will allow freight and passenger trains to move more quickly
10 through the area. The corridor will parallel Alameda Street along
11 most of its route.

12 Twenty-nine bridges will be built along the corridor to allow
13 automotive traffic to cross over the trench. The Project also
14 will include a number of street improvement and widening projects.

15 The Project is being constructed under the auspices of the
16 ACTA, a joint powers agency created to oversee the design and
17 construction. The seven members of the ACTA governing board
18 include two representatives each from the ports of Los Angeles and
19 Long Beach, one representative each from the city councils of the
20 cities of Los Angeles and Long Beach, and one representative from
21 the Los Angeles County Metropolitan Transit Authority ("LACMTA").
22

23 The estimated cost of the Project is \$2.4 billion. The
24 funding sources are \$1.1 billion in bond proceeds with bonds
25 backed by railroad user fees; a \$400 million loan from the U.S.
26 Department of Transportation; a \$394 million grant from the ports
27 of Los Angeles and Long Beach; \$347 million administered by
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1 LACMTA; and \$154 million in state and federal sources and interest
2 income. The Project began in April of 1997 and is to be completed
3 in early 2002.

4 As part of the construction process, approximately 900,000
5 cubic yards of ready-mix concrete are being pumped or poured
6 during the construction process. Four plants owned by
7 A&A/Robertson's provide the ready-mix concrete.

8
9 2. A&A and Robertson's

10 A&A has been in the business of selling concrete to the
11 general public since the 1940's. Its Long Beach plant has been
12 selling ready-mix concrete to commercial suppliers since the
13 1950's. Deliveries from A&A's plants in Gardena and Long Beach,
14 which provide concrete to the Project, do not constitute more than
15 25% of the annual volume from these plants. (Letter of Wayne K.
16 Lemieux, September 24, 1999.)

17 Robertson's is also a commercial supplier of concrete. Its
18 two plants are located in Vernon and Paramount, and have been in
19 business in the Southern California area for greater than forty
20 years. The Vernon plant is 11 miles from the nearest section of
21 the Project. The Paramount plant is 9 miles from the nearest
22 section of the Project. According to Robertson's, its deliveries
23 from the Vernon and Paramount plants will not constitute more than
24 a third of the annual volume sold and delivered from each of the
25 plants. (Letter of Howard C. Hay, September 24, 1999.)

26
27 None of the four plants, described above, was established for
28 the Project and all four plants will continue to operate after the

1 Project is complete. (Letters of Howard C. Hay and Wayne K.
2 Lemieux, September 24, 1999.)

3 A&A/Robertson's contracts with Tutor-Saliba, the general
4 contractor on the Project, consist of purchase orders that require
5 A&A/Robertson's to provide Portland Cement concrete to the Project
6 in accordance with the general contractor's schedule and subject
7 to inspection on arrival by on-site inspectors. The mix delivered
8 is standard concrete used in heavy construction. A&A/Robertson's
9 are denominated in the purchase orders as suppliers who may not
10 assign the orders.

11 3. The Drivers' Duties

12
13 The drivers who haul the ready-mix concrete to the Project
14 are employed by either A&A or Robertson's. They transport ready-
15 mix from one of the plants, with the revolving drum on the trucks
16 in operation to keep the concrete malleable. They bring the
17 material to a point on the site as directed by the general
18 contractor or a subcontractor. In approximately 95% of the
19 deliveries, the ready-mix concrete is deposited into ready-mix
20 pumps operated by the contractor or a subcontractor on the site.
21 Approximately 5% of the time, drivers unload the mix into forms on
22 the site. During delivery, drivers unlock the chute attached to
23 the truck and operate the controls either on the side of the truck
24 or inside the truck cab to discharge the concrete as directed by
25 the contractor. Drivers regulate the revolutions of the truck and
26 add water to the mix when requested. In almost all instances, the
27 drivers dump the entire load into the pump or form. In less than
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1 one percent of the time do drivers move from place to place on the
2 Project in the delivery of their loads.³

3 The spreading of the ready-mix concrete is the responsibility
4 of on-site employees. (Letters of Howard C. Hay and Wayne K.
5 Lemieux, September 24, 1999; Letter of Art Arbizu, Teamsters Rock
6 Products and Ready Mixed Concrete Industries Training and
7 Upgrading Fund, October 12, 1999.)

8 After the mix is delivered to the job site, the drivers leave
9 the Project site and return to the plant to pick up another load
10 of ready-mix concrete for delivery either to the Project or other
11 customers -- commercial and residential. During a normal workday,
12 drivers go to several different sites. None of them is "on call"
13 for or dedicated to the Project.
14

15 IV. Discussion

16 A. The Ready-Mix Concrete Delivery Drivers Need Not Be Paid
17 Prevailing Wages on the Project Because A&A/Robertson's Are
Material Suppliers.

18 The obligation of A&A/Robertson's to pay prevailing wages to
19 their drivers delivering ready-mix concrete to the Project depends
20 upon whether A&A/Robertson's are material suppliers or
21 subcontractors to the Project. Under the California Labor Code,
22 employees employed by contractors or subcontractors in the
23 execution of a public works contract must be paid prevailing wage
24 rates. Lab. Code §§ 1771, 1772 and 1774. Consistent with these
25 provisions, longstanding legal and Department precedent requires
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28 ³ According to Tutor-Saliba, for approximately 1,000 cubic yards of the
one million-yard Project, drivers move from place to place when dumping into
forms in what is termed a "gutter pour."

1 that employees of subcontractors who haul material to public work
2 sites be paid prevailing wages. Excluded from prevailing wage
3 requirements are employees of bona fide material suppliers. O. G.
4 Sansone, supra; Lusardi Construction Company v. Aubry (1992) 1
5 Cal.4th 976, 985-987, 4 Cal.Rptr.2d 837, 842-843; Department of
6 Industrial Relations v. Seaboard Surety Company (1996) 50
7 Cal.App.4th 1501, 1506-1507, 58 Cal.Rptr.2d 532, 534-535.

8 In Sansone, the leading California case to address prevailing
9 wage obligations for on-hauling of materials to a public works
10 site, trucking companies hauled sub-base material to a state
11 highway construction project from locations adjacent to and
12 established exclusively for the highway project. The material was
13 purchased by the prime contractor, which then contracted with
14 trucking firms to haul the sub-base to the project. The material
15 was dumped directly onto a roadbed, where workers on the project
16 incorporated the material into the roadbed. The trucking
17 companies in Sansone were found to be subcontractors for two
18 principal reasons. First, the materials they delivered were
19 acquired from third party locations adjacent to and established
20 exclusively for the project site, and, second, the trucking
21 companies were hired by the prime contractor to perform an
22 integral part of the prime contractor's obligations under the
23 prime contract.
24

25 In analyzing whether the trucking company was a subcontractor,
26 the Court adopted the United States Secretary of Labor's
27 administrative interpretations of the Davis-Bacon Act's exclusion
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1 of material suppliers from statutory coverage. The Court set forth
2 three principal criteria for the denomination of material supplier.
3 First, a material supplier must be in the business of selling
4 supplies to the general public. Second, the plant from which the
5 material is obtained must not be established specially for the
6 particular contract. Third, the plant may not be located at the
7 site of the work. The court adopted the view set forth in Green v.
8 Jones, 128 N.W.2d 1, that the three criteria apply where, as in
9 Sansone, materials may be *stockpiled*, rather than immediately
10 utilized.

11
12 The three criteria are applicable to the delivery of ready-mix
13 concrete. Although ready-mix cannot be stockpiled in the same way
14 that dirt, gravel or lumber can, ready-mix may be delivered for
15 later handling through delivery to a pump or, arguably, to a form.
16 In this case, approximately 95% of the mix is delivered to on-site
17 pumps. Only about 5% of the mix is delivered to forms.

18 We apply the criteria here to determine whether
19 A&A/Robertson's are material suppliers or subcontractors.

20 (1) Whether A&A/Robertson's sells supplies to the
21 general public.

22 It is undisputed that A&A/Robertson's have been in the
23 business of selling concrete products to the general public for
24 several decades. Deliveries to the Project from A&A come solely
25 from its Gardena and Long Beach plants. Only about 25% of the
26 annual volume from these plants will be delivered to the Project.
27 Similarly, concrete deliveries by Robertson's come only from its
28 Vernon and Paramount plants, of which no greater than 30% of their

1 annual output will be sold for the Project. No drivers are "on
2 call" for or dedicated to the Project. During the course of a
3 normal workday, drivers deliver both to the Project and to other
4 customers, commercial and residential.

5 (2) Whether the ready-mix plants were established
6 specially for the contract for the Project.

7 No party to this matter disputes that A&A/Robertson's plants
8 were not established specially for the Project. The plants have
9 been in existence for 50 to 60 years and will continue to exist
10 after the completion of the Project.

11 (3) Whether the plants are located at the Project
12 site.

13 Teamsters do not dispute the fact that none of
14 A&A/Robertson's plants are located at the Project site.

15 Based on the application of the above criteria,
16 A&A/Robertson's are material suppliers and not subcontractors.

17 (4) Whether the delivery of the ready-mix is an
18 integrated aspect of and functionally related to
19 the construction on the Project.

20 In addition to the three criteria discussed above, the
21 Sansone court also considered another factor in determining
22 whether a trucking company is a subcontractor or a material
23 supplier in situations where materials are not stockpiled. If the
24 materials hauled are immediately utilized with no rehandling out
25 of the flow of construction, their delivery is an integrated
26 aspect of and functionally related to the construction. Green v.
27 Jones, supra at 7.
28

1 Because the majority of the ready-mix used on the Project was
2 delivered to pumps for later use, this fourth criterion,
3 applicable only to material that is not stockpiled, is only
4 marginally relevant to an analysis whether A&A/Robertson's are
5 subcontractors or material suppliers. The only potential
6 relevance of the fourth criterion to this case might be to the 5%
7 of the deliveries that are dumped into forms.

8 In support of its position that drivers should be paid
9 prevailing wages, Teamsters state that "the mixer driver is the
10 most critical element in incorporation, delivery and pouring of
11 the concrete at the job site." Without the mixer driver, they
12 contend, there would be no pouring or spreading of the concrete.
13 (March 8, 2000 written response by Teamsters to Director's
14 February 25, 2000 questions.) Teamsters also assert that the work
15 performed by the drivers is integral to the construction activity.
16 General contractor Tutor-Saliba states that the drivers only
17 deliver the concrete to the job site and perform no placement or
18 other on-site work. (February 29, 2000 written response by Ronald
19 N. Tutor to Directors' February 25, 2000 questions.)
20 A&A/Robertson's corroborates Tutor-Saliba's position that the
21 concrete drivers do not perform any on-site work. (September 24,
22 1999 correspondence from Howard C. Hay.)
23

24 As with all work performed in relation to the Project, the
25 work of professional, well-trained ready-mix drivers is clearly
26 important to the success of the Project. The importance of
27 particular work, however, does not make it subject to prevailing
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1 wage payments. Rather, an analysis of the relationship of the
2 tasks performed by the drivers who deliver to the forms and the
3 on-site construction activity is required to determine whether
4 their work is an integrated aspect of and functionally related to
5 the construction work.

6 The following facts are not contested. The drivers transport
7 the ready-mix to the Project in a cement truck with a revolving
8 drum that keeps the concrete malleable. During the delivery into
9 forms, the driver positions the truck, unlocks the chute, operates
10 the controls to discharge the product, adds water to the mix when
11 requested, and then washes down the truck before leaving the job
12 site. In almost all instances, the entire load of concrete
13 delivered to the forms is dumped in one location of the form.⁴ The
14 spreading, vibrating and finishing of the concrete dumped into the
15 forms are done by on-site laborers and/or cement masons after the
16 drivers have dumped the mix. On-site inspectors test the quality
17 of the concrete. Drivers do not participate in this or any other
18 on-site work.

20 The work of the drivers dumping concrete into the forms is
21 delivery of a standard product that is rehandled by on-site
22 employees who spread and finish the concrete according to the
23 specifications of the project. The drivers perform no on-site
24 construction work. They do not work alongside the on-site workers
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28 ⁴ In less than one percent of the time do drivers move from place to
place in the dumping of their loads into the forms.

1 in the flow of the construction process. After dumping the loads
2 of concrete, the drivers leave the job site and return to the
3 plant for another load to be transported to either the Project or
4 to another customer. Notwithstanding the fact that all work
5 performed in relation to a construction project is important to
6 the success of that project, the delivery of the mix by
7 A&A/Robertson's drivers on this Project is not, as a matter of
8 law, an integrated aspect of and functionally related to the
9 construction work on the Project. Accordingly, the application of
10 the fourth criterion does not change the result that
11 A&A/Robertson's are material suppliers to the Project and not
12 subject to prevailing wage obligations.
13

14 B. The Failure of the California Legislature To Pass a Version
15 of AB 302 Making the On-Hauling of Concrete Mix a Public
16 Works Does Not Represent a Legislative Intent To Preclude
the Payment of Prevailing Wages to Concrete Mix Delivery
Drivers.

17 AB 302, in its original form, proposed to amend Labor Code
18 section 1720.3 to provide that on-hauling of concrete mix to a
19 public works site is a "public works." The final version of AB
20 302, which passed in July 1999, does not contain the concrete on-
21 hauling provision. Without authority, A&A/Robertson's argue that
22 the California Legislature's rejection of the proposal to add
23 concrete mix delivery to the definition of "public works," proves
24 that the Legislature decided that such on-hauling is not a "public
25 works."
26

27 It is true that the Legislature did fail to pass that version
28 of AB 302 that designated concrete mix on-hauling a "public

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1 works." The failure of a Legislature to pass a certain form of
2 legislation, however, is not indicative of the legislature's
3 intent as to the proposed amendments contained therein. Grupe
4 Development Co. v. Superior Court (1993) 4 Cal.4th 911, 16
5 Cal.Rptr.2d 226; Sacramento Newspaper Guild v. Sacramento County
6 Board of Supervisors 263 Cal.App.2d 41, 69 Cal.Rptr. 480. As
7 noted in Sacramento Newspaper Guild and cited with approval by the
8 California Supreme Court in Grupe, "California courts have
9 frequently noted, however, the very limited guidance that can
10 generally be drawn from the fact that the Legislature has not
11 enacted a particular proposed amendment to an existing statutory
12 scheme.... The light shed by such unadopted proposals is too dim to
13 pierce statutory obscurities. As evidence of legislative intent,
14 they have little value." (Id. at p. 923.)

16 Accordingly, while the California Legislature failed to pass
17 a version of AB 302 that would have designated the on-hauling of
18 concrete mix a "public works," such action does not reflect a
19 legislative intent to preclude the payment of prevailing wages to
20 concrete mix delivery drivers.

21 C. The Due Process Objections Raised by A&A/Robertson's Are
22 Moot Because They Were Given Full Opportunity on Appeal to
23 Respond to All Issues.

24 A&A/Robertson's argues that their procedural due process
25 rights were denied because they were not notified of the public
26 works coverage request before the August 27, 1999 determination
27 issued and were not served with the determination prior to their
28 appeals. Without defining any specific negative consequences,

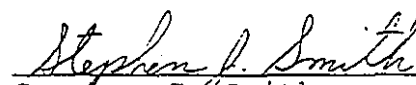
1 they assert that the failures are inconsistent with their and the
2 public's interests.

3 A&A/Robertson's should have been contacted prior to the
4 issuance of the determination. They should have been served with
5 a copy of the determination.⁵ I find, however, that their due
6 process objections are moot because their appeals were timely
7 filed and, in the course of the appeal, all parties, including
8 A&A/Robertson's took advantage of the opportunity given them to
9 present any argument or documentary evidence without limitation.
10

11 V. Conclusion

12 For the foregoing reasons, the August 27, 1999 determination
13 finding A&A/Robertson's to be subcontractors is reversed.
14 Prevailing wages are not required to be paid to their drivers
15 delivering ready-mix concrete to the Project.
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17 DATED: 4/10/2000

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Stephen J. Smith
Director
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27 ⁵ It would appear, based on their having filing timely appeals
28 addressing the content of the determination, that A&A/Robertson's received a
copy of the determination or gained knowledge of its contents prior to their
appeals.